COPY

No. 8104

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of MARGARET E. TOOEY, a Bankrupt.

MAZIE McLEOD and EDWIN J. MILLER,

Appellants,

vs.

DAN BOONE, a Petitioning Creditor, and HUBERT F. LAUGHARN, Trustee in Bankruptcy,

Appellees.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS APPEAL

Appeal from the District Court of the United States for the Southern District of California, Central Division.

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To the Honorable Circuit Justice, and to the Circuit Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

Come now the appellants and file this their brief and memorandum of authorities in opposition to the motion to dismiss appeal.

The motion to dismiss the appeal was made while the proceeding for leave to supply additional parts of the record was before the court. This brief and memorandum is addressed in resistance of the motion to dismiss only. But may we at this point suggest:

(1) That whether or not this case is appealable under section 24(a) of the bankruptcy act; and therefore

(2) Whether it is decided to be a "controversy" or a "proceeding" depends upon the record in the case; and before this court can really know what the case is about and know whether it is a "controversy" or whether it is merely a "proceeding" in bankruptcy, the court should have before it for consideration on this motion the several documents certified and presented to the court in support of the motion to supply additional parts of the record.

(3) As an illustration of the foregoing, the court necessarily needs to have before it, in disposing of this motion, the certificate of review made by the referee, which is certified and presented with the motion in the diminution proceedings; as well as the several other documents, claims and files, certified copies of which are presented in the diminution proceeding; all of which the District Court struck from the certificate of evidence and directed the clerk not to include them in the transcript of the files proper in the case.

Therefore, we are suggesting to your honors that in justice to the appellants, and in justice to the court before which this motion is being presented, it might

be well to postpone the final determination of this motion to dismiss the appeal, until the missing portions of the record are supplied by the diminution proceedings. We further suggest that whether the motion should, or should not, be granted depends upon facts to be presented on the hearing on the merits, as was the case in *Bank v. Title Co.,* 198 U. S. 280.

However, inasmuch as the Circuit Court of Appeal has ordered that the motion to dismiss be heard first, we are presenting herewith our points and authorities in resistance of said motion.

APPELLEES' POINTS

We shall first notice the points made by appellees in support of their motion to dismiss; then, in a later portion of this brief, we shall present our own points and authorities in support of our opposition.

At page four of appellees' brief they say:

> *"Appellants appealed from an order of the District Court affirming an order of the Referee in Bankruptcy by which assignment by certain creditors of the bankrupt to Dan Boone of an interest in their claims was recognized and the allowed claims of such creditors subrogated pro tanto to the assignment in favor of Boone."*

We take decided issue with that statement of fact, and in opposition thereto we allege that the instrument which they designate as *"assignment"* is not an *"assignment"*; and no interest in said claims, moneys, nor dividends, passed to Dan Boone thereby. Neither

does said instrument create a lien on the dividends; and it cannot properly form the basis for a subrogation judgment.

This instrument is set out in the transcript, pp. 28 to 31, to which we respectfully refer; and invite attention to the fact, that after setting out a supposed itemized statement which is in many respects very infirm and misleading, and the items which, in part, have already been paid by the order of the referee, viz., the two last items therein, aggregating $1474.20; being duplications of items already paid, as shown by the documents lodged with the clerk of this court in support of a pending motion, for leave to file same in this court on suggestion of diminution of the record.

After the list of claims, the particular language of the document which appellees claim is an assignment, is found on page 30 of the transcript; and the court will note that the language there used is not an assignment; but purports to be a promise (without consideration) to pay out of certain funds. It is not an order on anybody; it is not an authorization for anybody to pay; and said document and said items therein mentioned form the basis of a claim filed by Dan Boone against the bankrupt estate, and form the basis also of his three petitions for subrogation, a part of one of said petitions being shown in the transcript (pp. 26 to 31); and the other petitions being shown in the certified copies sought to be filed in this case on suggestion of diminution of the record. (That Boone filed a claim

against the estate for this $3856.79, see subrogation order, Tr., 36.)

The legal effect of the language which appellees refer to as an *"assignment"* is nothing more than a purported promise to pay; and that promise is entirely without consideration, and so purports to be on its face; and was obtained by improper means, as set out in our objections thereto, shown in the transcript (pp. 32 to 35); and as shown in the verbal testimony.

It is, therefore, in effect a suit by Dan Boone against Mazie McLeod and Edwin J. Miller, filed in the bankruptcy court to enforce what is alleged to be a contract and agreement; it is in the nature of a suit in attachment, to enforce an uncompleted gift, by which declared dividends are sought to be reached and to be taken in satisfaction of said alleged obligation; all of which (as has been decided by the Federal Court many times) cannot be done. The Referee and the District Court had no jurisdiction of the controversy, and should have dismissed the proceedings.

Re Girard Glazed Kid Co., 136 F. 511;

Nixon v. Michaels, 38 F. 2d, 420, and cases therein cited;

Re Hollander, 181 F. 1019;

Re Swofford Bros., 180 F. 549.

The above authorities, and others hereinafter cited, show that this is not a *"proceeding"* in the usual routine of bankruptcy proceedings, but is a "controversy" which is appealable under section 24a, and of which

this court can and should take jurisdiction, and reverse the District Court, and order the proceedings dismissed. Our objections and appeal raised the jurisdictional question. (See Tr., 22, par. 3.) The above authorities, with those hereinafter cited, refute every point made by appellees.

OUR POSITION

In order to show that this record presents a case which is usually designated by our higher courts as a *"controversy,"* as distinguished from a mere routine *"proceeding"* in the usual course of administration of a bankruptcy case, we think it will be helpful to this court to call attention on this preliminary motion to character of the "controversy" so that this court will see that it is not a routine matter *"proceeding."*

The referee's order (Tr., 38) and appellees' brief (p. 4) call the transaction *"subrogation."* We beg leave at this point to suggest that subrogation proceedings are not the usual routine matters that occur in the ordinary administration of bankruptcy cases.

In so doing we call attention to some, but not all, of the points of controversy which will come up properly on the hearing on the merits, but which we believe should be here suggested, so that the court can see that this is not a mere proceeding, but is a *"controversy"* appealable, both as to law and fact, and comes under section 24a, and that the appeal was properly allowed by the District Court.

Bank v. Title Co., 198 U. S. 280.

We call the action one in the nature of an independent suit in assumpsit, on the contract, which they (appellees and the referee) call, at some points an assignment, and at other times a subrogation agreement. It is neither an assignment nor a subrogation agreement, and the suit is also in the nature of an attachment. The District Court had no jurisdiction to adjudicate it, as the authorities which we shall hereinafter cite, we think, will conclusively show.

I.

THE AGREEMENT IS NOT A SUBROGATION AGREEMENT BUT AN OFFER OR PROMISE, WITHOUT CONSIDERATION, TO MAKE A GIFT.

There is a good definition of *"subrogation"* in the case of *Arp v. Blake,* 63 Cal. App. 362, at 367, as follows:

> *"The right of subrogation can arise only in favor of one who has, under some duty or compulsion, paid the debt of the other. It arises where one having a liability in the premises pays the debt due by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor whom he has paid. The doctrine of subrogation requires that the person seeking its benefit must have paid a debt due to a third person before he can be substituted to that person's rights, and it is not the liability to pay, but the actual payment to the creditor which raises the equitable right. (Aetna Life Ins. Co. v. Middle-*

port, 124 U. S. 534 (31 L. Ed. 537, 8 Sup. Ct. Rep. 625, see, also, *Rose's U. S. Notes*); 25 R. C. L. 1312, 1315.) See, also, *Matzen v. Shaeffer,* 65 Cal. 81 (3 Pac. 92); *Darrough v. Herbert Kraft Co. Bank,* 125 Cal. 272 (57 Pac. 983.)"

See Webster's definition of "subrogation" as follows:

> *"The substitution of one person in the place of another as a creditor; the new creditor succeeding to the rights of the former; the mode by which a third person who pays a creditor succeeds to his rights against the debtor."*

Governed by the above definitions, and by the authorities above cited, we say that the alleged agreement (Tr., 30) does not authorize subrogation—is not a subrogation agreement; it does not support the three petitions for subrogation, one of which is shown in part at transcript 27. It does not support the order of subrogation (Tr., 36, 37 and 38); and it must be apparent that this is nothing more than a suit in assumpsit for which the bankruptcy court is sought to be used, whereas in truth said bankruptcy court has no jurisdiction to hear or adjudicate upon the controversy. It is a "controversy" as distinguished from a "proceeding," and is appealable under 24a.

Pratt Lumber Co. v. Gill, 278 Fed. 783;
Smedley v. Speckman, 157 Fed. 815.

II.

THAT THERE WAS NO ASSIGNMENT; THERE WAS NO LIEN; NO SUBROGATION; SIMPLY A PROMISE WITHOUT CONSIDERATION TO MAKE A GIFT; WAS ENTIRELY UNENFORCEABLE, SEE THE FOLLOWING AUTHORITIES:

Fidelity v. Rogers, 180 Cal. 686;
Ritter v. Stevenson, 7 Cal. 388;
Pullen v. Placer, 138 Cal. 170;
Clay v. Walton, 9 Cal. at 334;
Christmas v. Russell, 81 U. S. 69;
Dillon v. Barnard, 88 U. S. 430;
Smedley v. Speckman, 157 F. 815;
Pratt Lumber Co. v. Gill, 278 F. 783.

The error of the Referee, of the District Court and of opposing counsel in treating and finding that said document is an *"assignment"* is apparent by the above authorities. This is a *"controversy,"* not a *"proceeding."*

III.

ANTECEDENT DEBT; AND/OR PAST CONSIDERATION; NOT SUFFICIENT TO SUPPORT PROMISE, ("A CONTROVERSY").

Golinsky v. Allison, 114 Cal. 461;
Comstock v. Breed, 12 Cal. 286;
Leverneaux v. Hildreth, 80 Cal. 139;
Chaffee v. Browne, 109 Cal. 211;

Lagamarsino v. Giannini, 146 Cal. 545;
Christian College v. Hendley, 49 Cal. 347.

It must, therefore, be apparent that this is not one of the usual and ordinary steps in the administration of bankruptcy, such as usually comes under the term of "proceeding"; but rather is one of those unusual circumstances and controversies which come under the term "controversies" in bankruptcy and is therefore appealable under section 24a. The language of the document, itself, refutes the finding of the referee as to consideration. Both the document itself and the testimony show that it was a past consideration.

IV.

NO AUTHORITY FROM MAZIE McLEOD — NO AGENCY — NO PROMISE — NO ASSIGNMENT — AND NO SUBROGATION BY HER.

There was no power of attorney held by Edwin J. Miller from Mazie McLeod when he signed the alleged subrogation agreement; she had given him no authority to sign for her, and she did not know of his acts (she was at Brookfield, Missouri, and he, at Los Angeles); and he so stated to Mr. Boone when he signed it. (See Tr., 34, 35, 42, 48, 49, 54, 55 and 57.) Yet the referee and the court held that the power of attorney on file gave authority to bind her. This power of attorney is attached to her claim and was never executed by her (see claim certified and filed herein on diminution proceedings). See *Engle v. Aetna Casualty,* 85 C.

41, at 46
A. D., (decided March 25, 1936). Yet the referee held, apparently, that this unexecuted power of attorney bound Mazie McLeod; and he refused to put the burden on Mr. Boone to prove authority given by her for the signature of the alleged subrogation agreement (the document was not signed by Mazie McLeod). There was no evidence offered tending to show authority to bind Mazie McLeod; yet there was evidence offered affirmatively showing that there was no authority to bind her. Under this condition of the record the act of the referee in rendering a judgment against her for more than $1,000.00, without proof of authority to bind her, was erroneous.

See:

Code of Civil Procedure, section 1981;
Scott v. Wood, 81 Cal. 398;
Whitaker v. Regents, 39 Cal. App. 111;
Estate of Latour, 140 Cal. 414;
Russell v. Banks, 11 Cal. App. 454;
Blum v. Robertson, 24 Cal. 127;
Golinsky v. Allison, 114 Cal. 458;
Hibernian Bank v. Moore, 68 Cal. 156;
Alcorn v. Buschke, 133 Cal. 655;
Billings v. Morrow, 7 Cal. 171;
Thomas v. Anthony, 30 Cal. App. 217;
Taylor v. Robertson, 14 Cal. 396;
Muggett v. Day, 12 Cal. 139;
Stetson v. Briggs, 114 Cal. 511;
People v. Roy, 91 Cal. App. 781;
Perkins v. Pacific, 132 Cal. 280;

Peterkin v. Randolph, 48 Cal. App. 302;
Ewing v. Hayward, 50 Cal. App. 708;
Pease v. Fink, 3 Cal. App. 31;
McDonald v. Kool, 134 Cal. 502;
Burns v. McCain, 107 Cal. App. at 291;
Preston v. Hall, 50 Cal. 43;
Woerner v. Woerner, 171 Cal. 298.

This suit cannot be held to be one of the usual routine matters arising in the course of administration of bankruptcy cases.

V.

AN ALLOWANCE OF AN APPEAL BY THE CIRCUIT COURT OF APPEALS WAS NOT NECESSARY. THE APPEAL IS UNDER SECTION 24a.

Nixon v. Michaels, 38 Fed. 2d 420;

Remington on Bankruptcy, 3d Ed., sec. 2191 and 2199;

Henrie v. Henderson, 145 Fed. 316;

Re Swofford, 180 Fed. 549.

This being true, the motion to dismiss the appeal should be denied.

VI.

EVEN IF THERE IS A RES IN POSSESSION OF THE BANKRUPT COURT DOES NOT FOLLOW THAT IT MAY BE REACHED AND LITIGATED BETWEEN TWO PERSONS IN A CONTROVERSY, IN WHICH THE CREDITORS, AS A WHOLE, HAVE NO INTEREST; AND IN WHICH THE ESTATE AND THE TRUSTEE HAS NO INTEREST EXCEPT AS STAKEHOLDER.

Nixon v. Michaels, supra;
Re American Telephone Co., 211 Fed. 88;
Re Hollander, 181 Fed. 1019;
Re Argonaut Shoe Co., 187 Fed. 784;
First National Bank v. Chicago, 198 U. S. 280;
Re Amy, 263 Fed. 8.

VII.

THE FACT THAT THE MONEY IS IN THE POSSESSION OF THE TRUSTEE DOES NOT GIVE THE REFEREE, NOR THE DISTRICT COURT, THE RIGHT TO LITIGATE THE CONTROVERSY WHERE THERE IS NO LIEN UPON THE FUND, AND TITLE HAS NOT VESTED BY ASSIGNMENT.

In *Re Hollander,* 181 Fed. 1019, the fund was in the possession of the trustee; the law of Maryland permitted attachments and garnishees of moneys in trustee's hands; the controversy came before that court in

a manner very similar to that which is before the court in the case at bar and the court there said:

> *"Where there are two or more persons who claim to be entitled to a fund in the possession of the court, or who claim to have liens upon that fund, the court necessarily has jurisdiction to decide upon their relative claims and contentions. But where, as in this case, the petitioner neither claims title to nor specific lien upon the fund in question, and has not procured the appointment of a receiver, who has succeeded to the creditor's title, the court cannot be asked to suspend or deny the right of the creditor to receive his dividend."*

VIII.

The $3856.79 claim, which is the basis of the alleged "subrogation" was not a provable claim against the estate of Margaret E. Tooey, Bankrupt; and in this respect it is similar to the case of Nixon v. Michaels, 38 Fed. 2d, 420 in which the court on that subject said:

> The complainants, M. C. Jones, Annie L. Jones and J. P. Jones, are not creditors of T. R. Jones, the bankrupt, and they do not claim to be such. *Their claim is not a provable debt against the bankrupt's estate. . . . Moreover, this controversy is one in which the trustee in bankruptcy and the unsecured creditors have no interest.*
>
> "In the case at bar the court did not have possession of the property, and the complainants in their bill *do not claim ownership thereof or a lien*

thereon; but, as we have said, they seek to have a trust declared in the property, *and a superior lien thereon decreed* in their favor. . . .

"We are of opinion that this proceeding *cannot be considered one for the administration and distribution of the property of the bankrupt,* and is in no proper *sense a bankruptcy proceeding, and that the district court was without jurisdiction in the cause.*

"Applying the principles announced in the foregoing cases to the facts in the case at bar, and bearing in mind that the intervenors were not creditors of the bankrupt, that they claimed no lien upon or interest in any of the assets of the bankrupt estate, that neither the trustee nor the creditors of the bankrupt were interested in the controversy of the intervenors, that the res sought to be reached by the intervenors was not in the possession of the bankrupt court, *we are led to the (425) conclusion that the bankruptcy court had no jurisdiction to determine the controversy.*

"In view of this conclusion, we are precluded from considering the other several interesting questions raised by the parties to this appeal.

"The former opinion of this court is withdrawn.

"The order of the trial court is reversed, with instructions to dismiss the petition in intervention for lack of jurisdiction."

IX.

IT IS AN ATTEMPT TO ENFORCE SPECIFIC PERFORMANCE OF THE ALLEGED AGREEMENT (VOID AS HEREIN SHOWN) BETWEEN TWO CREDITORS BY WHICH IT IS SOUGHT TO REACH DECLARED DIVIDENDS IN THE HANDS OF THE TRUSTEE.

This is a controversy in which the bankrupt estate has no interest; also one in which the general creditors, as a class, have no interest; also one in which the trustee in his official capacity has no interest except as being stakeholder; and one in which the bankruptcy court has no interest. The bankruptcy court, therefore, exceeded its jurisdiction in making the order; it is appealable under section 24(a), and this court should deny the motion to dismiss the appeal; but we contend this court should retain jurisdiction for the purpose of deciding that the lower court had no jurisdiction, and should reverse the orders and judgment appealed from, and order said court to dismiss the proceeding.

See:

Nixon v. Michaels, 38 Fed. 2, 420.

In re Henrie v. Henderson, 145 F. 316, the case was in many respects analagous to the case at bar, and the court said:

> *"It is a controversy which does not in the slightest degree affect the creditors of J. B. Henderson, the bankrupt, nor is the trustee in any*

wise affected. Stripped of all extraneous matters, it appears to be an effort on the part of Henderson to compel specific performance of a contract relating to the sale of the land. There is no provision which gives the bankruptcy court jurisdiction to hear and determine controversies of this kind. The object of the bankruptcy law is to afford the means by which the creditors of the bankrupt may secure an equitable and fair distribution of the bankrupt's property, etc., the settlement of the bankrupt's estate may be heard and determined in that court. But here we have parties who are contending about a matter which is in no way related to or connected with the affairs of the bankrupt. Under these circumstances, we fail to understand the theory on which this proceeding was instituted."

X.

THE BANKRUPTCY COURT IS A COURT OF LIMITED JURISDICTION; AND WHERE THE CONTROVERSY DOES NOT PERTAIN TO THE ADMINISTRATION OF THE ESTATE — THE BANKRUPT ESTATE NOT BEING INTERESTED — THE CREDITORS AS A WHOLE NOT BEING INTERESTED — THE BANKRUPTCY COURT HAS NO JURISDICTION TO DECIDE THE CONTROVERSY; AND RESORT MUST BE HAD TO ANOTHER FORUM.

In *Nixon v. Michaels,* 38 Fed. 2d. 420, the court on this subject said:

"The appellate court reversed the decree on the ground that the bankruptcy court had no jurisdiction. It said:

"The first question presented for our consideration is as to the jurisdiction of the bankrupt court to hear and determine the controversy between the real parties to this cause. The subject-matter of the suit is one of equitable cognizance purely. The District Court does not possess the general power to entertain a suit in equity, and, unless the bankrupt act has conferred upon it jurisdiction to entertain a plenary suit in equity, such a suit cannot be maintained. . . . *The jurisdiction of the District Court, as granted by the bankruptcy act, is unquestionable bankrupt jurisdiction, and not general jurisdiction to hear and determine controversies between adverse third parties, which are not strictly and properly a part of the bankruptcy proceedings.* . . .

"The controversy involved in this suit is not one relating to the collection and distribution of the bankrupt's estate.

"It is not a controversy with reference to property in the actual possession of the bankrupt court, or where it has been taken from the possession of its trustee or receiver without its authority. It is not one arising in the bankruptcy proceedings in reference to property subject to distribution to the general creditors of the bankrupt, or one where, by the nature of the controversy, power is conferred on the court to determine conflicting liens, *or the validity and priority of liens between secured creditors. This is an independent contro-*

versy between third parties who claim equities, as between themselves, in certain property of the bankrupt, which is not in the possession of the trustee, or a part of a fund for distribution among the general creditors of the bankrupt." (Italics ours.)

XI.

CONSENT CANNOT CONFER JURISDICTION WHERE THERE IS NONE

Nixon v. Michaels, supra;
Bardes v. Hawarden, 178 U. S. 524;
Henrie v. Henderson, 145 Fed. 316;
Nelson v. Svea, 178 Fed. 136;
Re Hollins, 229 Fed. 349;
Jones v. Kansas, 1 Fed. 2d 649;
Re Judith, 5 Fed. 2d 307.

XII.

WHERE THE COURT HAS NO JURISDICTION TO ENTERTAIN THE "CONTROVERSY"; THE COURT ITSELF WILL AT ANY POINT IN THE PROCEEDINGS RAISE THE QUESTION AND DISMISS THE ACTION (NOT DISMISS THE APPEAL).

Nixon v. Michaels, 38 Fed. 2d 420;
M. C. Ry. Co. v. Swain, 111 U. S. 379;
C. B. & Q. Ry. Co. v. Willard, 220 U. S. 413;
B. & O. Ry. Co. v. Parkersburg, 268 U. S. 365;
Highway v. McClelland, 14 Fed. 2d 406.

XIII.

ONE OF THE REASONS FOR DENYING THE RIGHT OF GARNISHMENT OF BANKRUPT DIVIDENDS; AND IN DENYING THE RIGHT OF THE THIRD PARTIES TO LITIGATE A CONTROVERSY IN WHICH THE BANKRUPTCY ESTATE IS NOT INTERESTED, IS THAT THE BANKRUPTCY LAW REQUIRES THE DIVIDENDS TO BE PAID WITHIN TEN DAYS AFTER BEING DECLARED, AND SUCH A PROCEEDING WOULD PREVENT THAT LAW FROM BEING CARRIED INTO EFFECT.

In this case the dividends are declared, and the payments thereof are prevented by the so-called "subrogation."

Priestly v. Hilliard, 187 Fed. 784 (California case);

Re Kolsaat, 14 Fed. 833.

In Re American Telephone Co., 211 Fed. 88, this was a proceeding in the Seventh Circuit, in which, by order of court, the trustee was permitted to be garnisheed by a writ from the state court, and at page 90 the court says:

> *"The effect is to inject into the bankruptcy proceeding a suit to enforce payment of the claim against a creditor of the bankrupt, a matter in which the trustee was not concerned, and one neither covered nor contemplated by the bankruptcy act. . . . Clause 2 of section 47 of the act of July 1, 1898, requires the trustee to 'close*

up the estate as expeditiously as is compatible with the best interests of the parties in interest.' Clause 9 of said section directs the trustee to 'pay dividends within ten days after they are declared by the referee.' "

XIV.

THE APPEAL BEING UNDER SECTION 24a OF THE BANKRUPTCY ACT; THE ENTIRE PROCEEDING BOTH AS TO LAW AND FACTS ARE OPENED AND THE LITIGATION IS A "CONTROVERSY."

Houghton v. Burden, 228 U. S. 161;
Loveland on Bankruptcy, 4th Ed., 826 to 829;
Hewit v. Berlin, 194 U. S. 296;
Knopp v. Milwaukee, 216 U. S. 545;
Coder v. Arts, 213 U. S. 233;
Taylor v. Voss, 271 U. S. 176;
Bryon v. Bernheimer, 181 U. S. 188;
Holden v. Stratton, 191 U. S. 115;
Duryea v. Sternbergh, 218 U. S. 299.

XV.

THAT ALTHOUGH THE REFEREE AND THE DISTRICT COURT HAD NO JURISDICTION TO ENTERTAIN NOR DECIDE THE "CONTROVERSY," (ONLY JURISDICTION TO DISMISS) YET IT IS A "CONTROVERSY" AND IS APPEALABLE UNDER SECTION 24a.

Re Kolsaat, 14 F. 833;
Christmas v. Russell, 81 U. S. 69;

Nixon v. Michaels, 38 Fed. 2d 420;
Bank v. Title Co., 198 U. S. 280;
Harrison v. Chamberlain, 271 U. S. 191.

In *Houghton v. Burden,* 228 U. S. 161, the court said:

> *"Being an appeal from a decree in a controversy arising in a bankruptcy proceeding, and therefore an appeal under 24-a, and not under 25-b, General Order . . . VI. made under the latter section and requiring a finding of facts, has no application and the appeal opens up to the whole case as in other equity cases. (Hewit v. Berlin Machine Works,* supra; *Coder v. Arts,* 213 U. S. 223; *Knopp v. Milwaukee Trust Co.,* supra."

At page 194 the court says:

> *"However, the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; . . . but if the controversy is found to be substantial it must decline to determine the merits and dismiss the summary proceeding."*

In *Bank v. Title Co.,* 198 U. S. 280, on the question of jurisdiction, the Supreme Court said:

> *"In many cases jurisdiction may depend upon the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go further. And where, in cases like that before us, the court erroneously retains jurisdiction to adjudicate the merits and its action can be corrected on review."*

May we again say that in justice to litigants that this court cannot know until a hearing on the merits, all the facts on which jurisdiction, or a lack thereof, depends and that, therefore, the motion to dismiss should be denied.

CONCLUSION

It is respectfully submitted that the appeal was properly taken under section 24(a) of the Bankruptcy Act; this being true, the order of the District Court allowing the appeal was all that was necessary. It is further respectfully submitted that the controversy was and is one in which the District Court had no jurisdiction to adjudicate, and that the judgment of the District Court should be reversed with directions to dismiss the suit. That the motion to dismiss the appeal should be denied.

It is further respectfully submitted that should this court finally, upon the consideration of the merits of the case, disagree with our contention, and hold that the District Court had jurisdiction to determine the controversy, then we respectfully submit that the judgment of the District Court was entirely wrong upon the merits, and that its judgment should be reversed. In either event, the motion to dismiss the appeal should be denied.

Respectfully submitted,

EDWIN J. MILLER,
Attorney for Appellants.